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No. 85-1129

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

PAUL E. JOHNSON,

Petitioner

v.

TRANSPORTATION AGENCY, SANTA CLARA COUNTY, CALIFORNIA, and SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 715,

Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, AND THE PORTO RICAN LEGAL DEFENSE AND EDUCATION FUND, INC. AS AMICI CURIAE SUPPORTING RESPONDENTS

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Equal Employment Opportunity Commission, Affirmative Action Appropriate Under Title VII of the Civil Rights Act of 1964, As Amended, 29 C.F.R. §§ 1608.1-.12 (1985) 6, 9, 11, 24

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Coal Week, Mar. 29, 1982, vol. 8, no. 13 (LEXIS, Nexis library, Omni file) 13

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Jonathan S. Leonard, *The Impact of Affirmative Action* (1983) 19

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INTEREST OF THE AMICUS CURIAE

The Lawyers' Committee for Civil Rights Under Law was organized in 1963, at the request of the President of the United States, to involve private attorneys in the national effort to assure the civil rights of all Americans. During the past 23 years, the Lawyers' Committee and its local affiliates have enlisted the services of thousands of members of the private bar in addressing the legal problems of victims of discrimination in all forms.

The Mexican American Legal Defense and Educational Fund ("MALDEF") is a national civil rights organization established in 1967. Its principal objective is to secure, through litigation and education, the civil rights of Hispanics living in the United States. In this context, MALDEF has advocated the adoption of voluntary affirmative action plans that permit employers to consider race, national origin and gender as affirmative factors when making employment decisions. Such plans provide an important remedy against entrenched employment discrimination, thus providing groups which have been historically discriminated against and thus underrepresented in specific job classifications an opportunity to participate fully in the American economic system. The modest gains achieved under such plans are of particular importance to Hispanic women, who encounter the double burden of discrimination based on national origin/race and sex.

The National Association for the Advancement of Colored People is a non-profit corporation. Its principal objectives include promoting equality of rights, eradicating prejudice among the citizens of the United States and securing for them increased employment opportunities according to their abilities.

The Porto Rican Legal Defense and Education Fund, Inc. is a national organization dedicated to protecting and furthering the rights of Porto Ricans and other Hispanics

All of the amici support affirmative action plans as vital remedies for unlawful discrimination. They believe that a ruling striking down the plan used in this case would eviscerate voluntary employer efforts to eradicate that discrimination.

STATEMENT OF THE CASE

Petitioner, Paul E. Johnson, who did not receive a desired promotion, sued his employer, Respondent Transportation Agency, Santa Clara County, California (the "Agency") in the United States District Court for the Northern District of California. Petitioner alleged that the Agency discriminated against him on account of his sex in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et. seq*. (1982), by promoting a qualified female employee, Diane Joyce, in his stead. In promoting Joyce as one of seven employees certified as "qualified" for the position of road dispatcher, the Agency considered her gender as an additional positive factor in the promotion.

At the time of Joyce's promotion, the skilled craft job category comprising the road dispatcher position contained 238 employees, all of whom were men. As stated in the Agency's Equal Employment Opportunity Affirmative Action Plan of December 18, 1978 (the "1978 Plan"), "women in . . . skilled craft job classifications . . . have traditionally been greatly underrepresented." Joint Appendix ("J.A.") 58. Road dispatchers maintain records and assign crews, equipment, and materials to road maintenance jobs in the County. J.A. 23-24.

In addition to the overwhelming statistical proof, the record reflects evidence of discriminatory attitudes and conduct on the part of Agency supervisory employees. As the Agency's Director testified, it has been an Agency "dominated by males, mostly white males." Transcript at 66. The Director also testified that various complaints had been filed with the Agency, as well as state or federal equal opportunity agencies, charging the Agency with sex discrimination. *Id*. at 42-44. The Director's responses to this line of questioning, however, demonstrate his hesitancy in admitting any specific instances of prior discrimination and highlight the practical impossibility of expecting employers to make such admissions, even when attempting to justify their own remedial conduct. In addition, an employee from the Agency's personnel department testified that her office had received complaints of sex discrimination.

For example, a female traffic painter had been routinely excluded from training opportunities given men in her job classification, making her ineligible for promotion opportunities. *Id.* at 231, 252. The personnel officer also testified that the Agency had routinely refused to hire pregnant women in its transit district. *Id.* at 256.

Diane Joyce herself suffered from discriminatory attitudes and behavior. When she first interviewed with the Agency, two interviewers told her individually that they preferred to hire a man. *Id.* at 110-11. Other possibly discriminatory instances included the Agency's refusal to issue Joyce a pair of coveralls to preserve her clothing during County maintenance and painting jobs, while routinely issuing coveralls to men. *Id.* at 89-90.

The record also reflects that sexual stereotypes may have influenced some members of the oral board that interviewed the road dispatcher candidates. For example, James Baldanzi, a road superintendent who participated in one interview of all the candidates, testified that he considered Diane Joyce, "not a lady," but, rather, "a rebel rousing, skirt-wearing person." *Id.* at 153, 161.

Joyce and Petitioner each met the minimum qualifications for the position of road dispatcher, having had at least four years of previous dispatch experience or four years of road maintenance experience with the County. Appendix to Petition for Writ of Certiorari ("Pet. App.") 18a.

In 1980, Joyce, Petitioner, and eight other employees applied for a recently vacant position of road dispatcher. An oral board gave Joyce the third highest score, 73, on an examination, while Petitioner tied for second with a score of 75. A second, departmental oral board recommended Petitioner for the position. Acting pursuant to the Agency's voluntary 1978 Plan and the Agency's Civil Service Rules giving him discretion to appoint any candidates who appeared on a "qualified" list, the Agency Director chose Joyce for the position. Pet. App. 4a.

The 1978 Plan provided that "mere prohibition of discriminatory practices is not enough to remedy the effects of past practices and to permit attainment of an equitable representation of . . . women . . . ." J.A. 31. Also noting that the plan "should

result in improved personnel practices that will benefit all Agency employees who may have been subjected to discriminatory personnel practices in the past," the stated goal of the plan was "to attain an Agency work force whose composition reflects the ethnic and sexual make-up of the area work force." J.A. 34.

The district court ruled for Petitioner. The court stated that its conclusion "does not constitute a square holding that the Affirmative Action Palns [sic] in issue are impermissable [sic] under Title VII . . . requirements" and that its holding was "only that defendant did not sustain its burden of proof in that regard." Pet. App. 8a. The gist of the district court's opinion is that the Agency failed to carry its purported burden of proving that its 1978 Plan and later plans were merely temporary measures under *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979). Pet. App. 14a.

The United States Court of Appeals for the Ninth Circuit reversed, holding that the purposes of the Agency's plan mirror those of Title VII, and that the promotion of Joyce pursuant to the plan satisfied the requirements set forth by this Court in *Weber*. Pet. App. 23a, 29a. Noting that "[w]hen Joyce was promoted to road dispatcher, the Agency's 237 other skilled craft positions were all held by men," the court of appeals explained that:

> Like the *Weber* plan, the Agency affirmative action plan is a remedial effort intended to break down entrenched patterns of discrimination. The Agency plan contains extensive statistics illustrating the underrepresentation of women, minorities, and the handicapped in various Agency job categories. The plan acknowledges "entrenched patterns in hiring and promotion" and recognizes the particular difficulty of achieving parity in upper-level positions when discriminated groups have been traditionally excluded from the trainee-level jobs.

Pet. App. 26a.

The court of appeals also held that an employer need not show its own history of purposeful discrimination to demonstrate

that its plan is remedial. *Id*. Despite this holding, the court found that, "were a showing of arguable violation required, we suggest that two hundred and thirty eight to zero suffices to show that too (were Ms. Joyce the plaintiff here, the job having gone to Mr. Johnson, the statistics would make out a prima facie case of discrimination)." *Id*. at 49a n.5.

Finally, the court of appeals held that the Agency plan also satisfied the requirements of *Weber* in that it was temporary and it did not create an absolute bar to the advancement of other employees or unnecessarily trammel the interests of other employees. *Id*. at 27a-29a. Recognizing that the promotion of one individual rather than another for a single job opening cannot fairly be deemed an "absolute bar" to the advancement of a whole class of employees, the court of appeals thus concluded that "the Agency's selection of Joyce, pursuant to the plan, was a lawful effort to remedy an entrenched pattern of manifest imbalance." *Id*. at 29a.

SUMMARY OF ARGUMENT

This case is of importance because it represents an effort by Petitioner and the Department of Justice to undermine last Term's decisions permitting narrowly-drawn voluntary affirmative action plans to correct the effects of past discrimination. If the existence of an all-male 238-person job classification does not justify the affirmative action plan here, it is hard to imagine how any voluntary affirmative action plan could be upheld.

Public employers are statutorily and constitutionally obligated to eliminate every vestige of gender segregation and discrimination in the workplace. *Cf*. *Wygant v. Jackson Board of Education*, 106 S. Ct. 1842, 1848 (1986) (plurality opinion). "Pursuant to that goal, [gender]-conscious remedial action may be necessary." *Id*. In a series of cases beginning with *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979), this Court has continuously held that affirmative remedial measures that do not unnecessarily trammel the rights of nonminorities are consistent with the letter and spirit of Title VII.

In this case, a public employer faced a workplace that had conspicuous discriminatory patterns of employment. Engaging in the kind of self analysis recommended by the Equal Employment Opportunity Commission, the Agency concluded that merely prohibiting discriminatory practices would be insufficient to "remedy the effects of past practices and to permit attainment of an equitable representation" of women in the workplace. Equal Employment Opportunity Commission, Affirmative Action Appropriate Under Title VII of the Civil Rights Act of 1964, As Amended, 29 C.F.R. § 1608.4 (1985); J.A. 31.

An employer's voluntary gender-conscious promotion policy is presumptively valid under Title VII when the employer has a firm basis for concluding that remedial action is appropriate. The Agency had an overwhelming basis for concluding that its affirmative action plan was appropriate in this case. The record demonstrates that women have suffered and complained of discriminatory treatment, particularly in the Agency's numerous traditionally male job categories. Statistics also confirm the conclusion that the Agency has discriminated against women. For example, before Joyce's promotion, the traditionally male skilled craft job category contained not one woman. Joyce, the first woman promoted to that category, was an experienced employee deemed "qualified" after a fair examination process. In promoting Joyce, the Agency legally considered her gender as an additional positive factor that she possessed.

An employer is not required to admit or prove that it has discriminated in the past in order to institute or apply an affirmative action plan. Requiring employers to admit that they have engaged in past illegal discrimination would frustrate the remedial purposes of Title VII. The Court has consistently emphasized that Title VII contemplates voluntary compliance. *See, e.g., Local 93, International Association of Firefighters v. City of Cleveland*, 106 S. Ct. 3063, 3072 (1986).

The Agency relied on overwhelming statistical proof to conclude that affirmative action was necessary to remedy a severe underrepresentation of women. Statistical disparity is probative of past discrimination. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 339 (1977). Therefore, regardless

of the level of proof that this Court imposes on the Agency, the affirmative plan is valid. Under the better approach, the plan was valid as a reasonable response to a conspicuous absence in the work force of the minority members Congress sought to protect in Title VII. This standard addresses the need for remedial measures from the viewpoint of the employer. Even under a more stringent test, however, the Agency has demonstrated sufficient evidence of sex discrimination to justify its plan. As the court of appeals pointed out, the Agency's statistical evidence alone would make out a prima facie case of discrimination against women. Pet. App. 49a n.5.

This case asks that the Court reaffirm the long-standing principle that the plaintiff in a disparate treatment Title VII case carries the burden of persuading the court that his employer has engaged in illegal discrimination. *Wygant*, 106 S. Ct. at 1848, 1856. Petitioner's attempt to devise a presumption that all affirmative action plans are invalid and to place the burden of proving their validity on the employer should be rejected. The district court was simply mistaken in placing the burden of proof on the Agency, and its ruling in favor of Petitioner was properly reversed for that reason.

The Agency's plan was flexible and fair and was applied in a reasonable manner. It did not create an absolute preference for women or encourage layoffs of men. *Cf. Wygant*, 106 S. Ct. at 1851-52. The plan did not require the Agency to promote a woman to the road dispatcher position, nor did it impose a rigid goal. Rather, it expressed a desire to remove "any possible barriers to employment and promotion" of women and to "attain an equitable representation" of women at all job levels. J.A. 31. By considering gender as an additional positive factor, the Agency applied a fair policy in a flexible manner, thereby protecting the interests of male employees. Thus, the plan neither served as an absolute bar to the advancement of men nor unnecessarily trammeled their interests.

The purposes of the Agency's affirmative plan mirrored the very purposes of Title VII. *Cf. Weber*, 443 U.S. at 208. The

federal courts should accord employers the freedom and discretion to take voluntary action in order to remedy entrenched patterns of discrimination. Title VII demands no less.

ARGUMENT

Last Term's attack on affirmative action by the Department of Justice failed in the face of a consistent recognition by the Court that narrowly-drawn, flexible, temporary affirmative action plans are a useful and permissible tool for the correction of the results of a history of discriminatory hiring. Without permitting the exclusion of members of the majority from a job classification, the Court's decisions opened the way to voluntary affirmative action programs which would bring members of minority groups into positions from which they have previously been virtually — or in this case totally — excluded.

Rather than rejoice in this announcement that Congress in enacting Title VII had properly opened employment to those who had been systematically excluded from job opportunities, the Department of Justice now asks the Court to limit the scope of the Court's decisions by hedging them round with restrictions which would mean that the effects of exclusion cannot be corrected, however willing the employer may be to do so. By arguing that the employer must prove as an affirmative defense that imbalance in the work force sought to be corrected by its affirmative action plan was the result of its prior discrimination, the government would place a two-fold burden on employers. First, it makes it easier for an employer to do nothing to correct long term discrimination unless a victim of that discrimination comes forward to sue. Second, it raises the likelihood that the proof required to justify the affirmative action plan will become the basis of damage suits which would otherwise never exist.

The century and more since the enactment of the Fourteenth Amendment have not changed the basic fact that minorities are by definition less powerful than majorities in a democracy. Employers do not adopt affirmative action plans because they are popular; they adopt them because they recognize

that minority employees and job applicants have suffered discrimination at the hands of the majority. The standards of proof adopted by the court of appeals here were appropriate to the purposes of the Fourteenth Amendment, Title VII, and this Court's decisions interpreting those provisions.

RESPONDENT AGENCY WAS JUSTIFIED IN INSTITUTING AND APPLYING ITS FLEXIBLE AND FAIR AFFIRMATIVE ACTION PLAN TO REMEDY A CONSPICUOUS DISCRIMINATORY PATTERN OF EMPLOYMENT.

Weber and its progeny make clear that Title VII does not forbid employers from voluntarily instituting affirmative action plans that accord racial preferences. *United Steelworkers of America v. Weber*, 443 U.S. 193, 200 (1979); *Local 28 of the Sheet Metal Workers' International Association v. EEOC*, 106 S. Ct. 3019, 3072-73 & n.8 (1986). Indeed, the Court has extolled their virtues in avoiding litigation and in fulfilling the clear, congressional intent to encourage voluntary compliance with Title VII. *See Local 93, International Association of Firefighters v. City of Cleveland*, 106 S. Ct. 3063, 3072 (1986) ("[w]e have on numerous occasions recognized that Congress intended for voluntary compliance to be the preferred means of achieving the objectives of Title VII"). The *Weber* Court emphasized:

> It would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had "been excluded from the American Dream for so long," constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy.

223 U.S. at 204 (citation omitted). Similarly, the Equal Employment Opportunity Commission's guidelines on affirmative action, Affirmative Action Appropriate Under Title VII of the Civil Rights Act of 1964, As Amended, ("Affirmative Action Guidelines"), recognize the congressional intent to encourage

voluntary affirmative action. 29 C.F.R. § 1608.1 (1985). The EEOC's interpretations of Title VII are entitled to great weight. *See, e.g., City of Cleveland*, 106 S. Ct. at 3073.

The Court has also made clear that remedial measures need not be limited to actual victims of past discrimination. *Sheet Metal Workers*, 106 S. Ct. at 3054. The United States' assertion that the Agency's plan was improper because it was not "victim-specific" is, thus, a fallacious repetition of rejected arguments. Although it asks the Court to rule that the Agency must justify its use of "gender discrimination in favor [of] nonvictims" to remedy historical imbalances, as opposed to "some less disfavored" remedy, the United States nevertheless admits—as it must—that *Sheet Metal Workers* resolved this question against it. Brief for the United States as Amicus Curiae Supporting Petitioner at 30, 12-13.

In fact, this Court has recognized that affirmative action is a valuable tool in avoiding and remedying the effects of discrimination. This case gives the Court the opportunity to establish definitive prerequisites of a valid affirmative action policy. Title VII and this Court's cases interpreting Title VII point the direction those prerequisites should take.

A. The Agency's Voluntary Sex-Conscious Promotion Policy Is Presumptively Valid under Title VII Because the Agency Had a Firm Basis for Concluding That Remedial Action Is Appropriate.

The first principle is that to promote the remedial policies underlying Title VII and to avoid discouraging employers from rectifying discrimination, an affirmative action plan instituted by an employer that has a firm basis for concluding that remedial action is appropriate should be presumptively valid. As this Court stated in *Wygant*, employers must only have "convincing evidence that remedial action is warranted" in order to justify taking affirmative measures. 106 S. Ct. at 1848.

Justice Powell, writing for the plurality in *Wygant*, emphasized that the need for remedial action must be determined by the employer itself. The opinion did not require employers to

carry the same evidentiary burden that an employee would have to bear to succeed in an action to enforce Title VII. All that is necessary is that an employer:

> . . .have sufficient evidence to justify the conclusion that there has been prior discrimination.
>
> . . .[T]he trial court must make a factual determination that the employer had a strong basis in evidence for its conclusion that remedial action was necessary. The ultimate burden remains with the employees to demonstrate the unconstitutionality of an affirmative action program.

Id.

The proper standard for testing the validity of an affirmative action program must be devised in light of the congressional preference for voluntary attainment of equal employment opportunity. *See, e.g.*, H.R. Rep. No. 914, 88th Cong., 1st Sess., pt. 1, at 18 (1963) ("[n]ational leadership provided by the enactment of Federal legislation dealing with the most troublesome problems [of discrimination] will create an atmosphere conducive to voluntary or local resolution of other forms of discrimination."). *See also* Affirmative Action Guidelines, 29 C.F.R. § 1608.1 (1985) (exposing employers who engage in affirmative action to Title VII liability threatens to "immobilize or reduce the efforts of many who would otherwise take action to improve the opportunities of minorities and women without litigation, thus frustrating the Congressional intent to encourage voluntary action . . . .").

Thus, Justice Blackmun asserted in *Weber:*

> Strong considerations of equity support an interpretation of Title VII that would permit private affirmative action to reach where Title VII itself does not. The bargain struck in 1964 with the passage of Title VII guaranteed equal opportunity for white and black alike, but where Title VII provides no remedy for blacks, it should not be construed to foreclose private, affirmative action from supplying relief. It seems unfair for respondent Weber to argue, as he does, that the asserted scarcity of black craftsmen in Louisiana,

> the product of historic discrimination, makes Kaiser's training program illegal because it ostensibly absolves Kaiser of all Title VII liability. . . . Absent compelling evidence of legislative intent, I would not interpret Title VII itself as a means of "locking in" the effects of segregation for which Title VII provides no remedy.

443 U.S. at 214-15 (Blackmun, J., concurring).

Employers must be free to utilize affirmative action when they have a firm basis for concluding that remedial measures are appropriate. The Agency has made a strong showing of a firm basis for remedial action.

1. The Agency Instituted Its Plan Based on Convincing Evidence of Discrimination.

The absence of women from a traditionally male job category raises an inference of discrimination. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 339 (1977). An employer, faced with stark statistical disparity in its workplace, must be given the freedom to remedy what it perceives to be the effects of past discrimination on its part. No one is in a better position to draw a reasonable inference that discrimination may have caused the statistical imbalances than the employer itself.

In 1978, Agency records demonstrated that absolutely none of the Agency's skilled craft workers were women. In fact, skilled craft was the only job category in the Agency that lacked women. 1978 Plan, J.A. 49. In 1978, the Agency further recognized that women were underrepresented in the Agency as a whole, particularly in job classifications that are traditionally male. *Id.* at 51. In fact, in its 1978 Plan, the Agency characterized women as "the most underrepresented group in the Agency." *Id.* at 53. The Agency attributed the underrepresentation largely to "entrenched patterns" and "hidden discrimination" in its "selection and appointment processes." *See id.* at 71, 85, 65, 35.

It is clear beyond peradventure that statistical disparity is probative of employment discrimination. *Bazemore v. Friday*,

106 S. Ct. 3000, 3008-09 (1986) (statistical wage disparities constitute probative evidence of discrimination); *Weber*, 443 U.S. at 197-99 (statistical disparities indicate racial imbalances in traditionally segregated job categories); *Hazelwood School District v. United States*, 433 U.S. 299, 307-08 (1977) (gross statistical disparities alone may constitute prima facie proof of a pattern or practice of discrimination); *Teamsters*, 431 U.S. at 339 (statistical evidence is important and competent in proving employment discrimination). This Court has not required plaintiffs in enforcement suits or employers defending affirmative action plans to amass conclusive proof of a causal nexus between statistical imbalances and discriminatory conduct. The *Bazemore* Court explicitly held that a plaintiff in an enforcement suit under Title VII need not prove discrimination with a scientific certainty. 106 S. Ct. at 3009.

The historical and recurring exclusion of women from skilled craft jobs is sufficiently pervasive to warrant judicial notice. The relative absence of women from traditionally male jobs has been caused by widespread, individual instances of discrimination, not merely "societal discrimination." *See, e.g., Kyriazi v. Western Elec. Co.*, 461 F. Supp. 894 (D.N.J. 1978) (company systematically denied women employment opportunities in traditionally male jobs); N.Y. Times, Jan. 1, 1984, § 3, at 1, col. 3 (skilled craft jobs, from which women have been excluded, still held predominantly by men). The United States Department of Labor has noted that although women have been interested in skilled craft work, sex discrimination has limited their participation. U.S. Dep't of Labor, Women's Bureau, No. 17, *A Woman's Guide to Apprenticeship* 4 (1980) ("*A Woman's Guide to Apprenticeship*"). *See also* Coal Week, Mar. 29, 1982, vol. 8, no. 13, at 3 (LEXIS, Nexis library, Omni file) (coal contractors have no intentions of hiring women miners until forced to do so by the government); Associated Press, Washington Dateline, Feb. 18, 1982 (LEXIS, Nexis library, Omni file) (women desiring construction jobs face discrimination); United Press International, Regional News, Nov. 17, 1982 (LEXIS, Nexis library, Omni file) (women equipment operators face discrimination); United Press International, Regional News, June 25, 1981

(LEXIS, Nexis library, Omni file) (women denied construction jobs).

Many recent studies have demonstrated that despite some progress attributed in part to affirmative action, women are largely excluded from skilled craft jobs. *See, e.g.*, Committee on Women's Employment and Related Social Issues, *Women's Work, Men's Work — Sex Segregation on the Job*, National Academy Press, Washington, D.C., 27 table 2-5 (B. Reskin & H. Hartman ed. 1986) ("*Women's Work*"); Herbert Hammerman, *A Decade of New Opportunity: Affirmative Action in the 1970's*, Potomac Institute, Washington, D.C., 70-71 & 77 table V-8 (no progress in state and local government employment of women in skilled craft positions between 1973 and 1980). In addition, all indications are that discrimination is largely responsible for the dearth of women in skilled craft and other traditionally male jobs. *A Woman's Guide to Apprenticeship, supra*, at 4. As soon as employers open opportunities to women, women have quickly shown their eagerness to enter nontraditional jobs. *Women's Work, supra*, at 76-77. The Agency itself concluded that "[i]ndications are that there is an increasing percentage of women in the area who desire to work in non-traditional positions. This makes it desirable to . . . provide them an opportunity to compete for available positions." 1978 Plan, J.A. 66.

Historical discrimination against women is no stranger to the Transportation Agency. Indeed, despite a County work force comprised of 36.4% women, the Agency employed no women in its 238-man skilled craft category. J.A. 54. This contrasts with Department of Labor statistics showing that approximately 6% of craft workers nationwide in 1981 were women. *Women's Work, supra*, at 27 table 2-5. The statistical disparity in the Agency is even greater than that which convinced the Court that the voluntary affirmative action plan in *Weber* was justified. In *Weber*, 1.83% of the skilled craft workers at the plant in question were black, despite a work force in the area that was approximately 39% black. 443 U.S. at 198-99. Citing numerous judicial findings of exclusion from crafts on racial grounds, the *Weber* Court took judicial notice of the racial discrimination that led to the affirmative action plan. *Id.* at 198 n.1. The exclusion of women from

the traditionally male jobs at the Agency similarly supports the conclusion that sex discrimination on the part of the Agency was at play. After all, it is the Agency that chooses the composition of its workforce and is legally accountable for that choice.

Thus, as the court of appeals determined, the statistics in this case would make out a prima facie case of discrimination against women by the Agency. Pet. App. 49a n.5. *See also Setser v. Novack Investment Co.*, 657 F.2d 962, 968 (8th Cir.) (in banc) (showing of conspicuous statistical imbalance was sufficient to justify affimative action plan), *cert. denied*, 454 U.S. 1064 (1981). In addition, as noted above, there was evidence of discriminatory behavior by the Agency.

The possibility that employment decision making may be infused with sexual biases, especially in traditionally male jobs, highlights the need for affirmative action policies in general and the use of the Agency's affirmative action plan in particular. Where employers have structured their workplaces in ways that have reinforced gender segregation, goals and timetables have been effective in opening employment opportunities to women in sex-segregated industries. *Women's Work*, *supra*, at 81, 131; *A Woman's Guide To Apprenticeship*, *supra*, at 2-3. The plan explicitly stated that the Agency should attempt to attain a "reasonable" approximation of work force composition by being sensitive to employment opportunities at each level of the personnel decision-making process. J.A. 61. The plan further provided that annual short range employment goals, established to meet long range goals, must "permit adjustments . . . as may be necessary because of limitations on hiring or reductions in the County work force . . ." *Id.* A short term goal to attain a fair representation of women in the workplace forces selection officials to reevaluate personnel decision making and standards necessary for job performance in order to ensure fair competition for underrepresented groups. As part of this process, the intervention of more responsible and objective supervisors is crucial to guarantee that lower level selection officials do not continue to rely on exclusionary ethnic and gender stereotypes.

The Agency's affirmative action representative and, most importantly, the Agency Director, fulfilled this function in this

case. The Director, who had not personally worked with any of the candidates, brought a more responsible and detached viewpoint into the decision-making process. The Director was responsible for hiring and promotion in the Agency, as well as for meeting the Agency's affirmative action goals. As he testified, the Director had on numerous occasions made the final decision in promoting an employee. Transcript at 53. Infusing traditionally discriminatory hiring and promotion decision making with an official sensitive to equal employment opportunity is crucial in reversing discriminatory patterns and practices in employment.

2. The Plan Was Flexible, Remedial, and Temporary, and Does Not Serve as an Absolute Bar to the Advancement of Men.

Recognizing the stark gender disparities in its workplace, and acting on its commitment to achieving employment opportunities for all, the Agency created an affirmative action plan. The 1978 Plan provided:

> The County and Transit District Boards of Supervisors recognize that mere prohibition of discriminatory practices is not enough to remedy the effects of past practices and to permit attainment of an equitable representation of minorities, women and handicapped persons. Affirmative, aggressive, continuing actions are required to attain this goal.
>
> Consequently, it is the will of the County and Transit District Boards of Supervisors that the Transportation Agency take affirmative continuing action as required to assure that:
>
> a. Employment by the Agency is kept freely open to all persons regardless of race, color, national origin, religion, sex, age, or handicapped status.
>
> b. Any possible barriers to employment and promotion of minorities, women, and handicapped persons are removed.

> c. Aggressive and imaginative continuing efforts are made to attract and assist minorities, women and handicapped persons to qualify for employment and promotion as needed to attain an equitable representation in all occupational fields and at all job levels.

J.A. 31-32.

The Agency set a long range goal of attaining a work force whose composition approximates the distribution of women in the Santa Clara County work force. *Id.* at 54. Setting a figure to be modified according to new Census Bureau data, the Agency determined that 36.4% of the County work force comprised women. *Id.* The 1978 Plan recognized serious barriers to its goal. For example, the plan noted that the positions in which women are underrepresented require specialized training and experience, which many women lack because of their relative absence from those traditionally male jobs. *Id.* at 56. Moreover, the plan noted that a low turnover rate among employees leaving the Agency made positions for advancement relatively rare. *Id.* In addition, the plan stated that many women do not naturally apply for jobs in which they have faced limited opportunities in the past. *Id.* at 57.

The United States wholly mischaracterizes the intent and function of the plan. The plan was formulated after a thoughtful self-examination of discriminatory patterns in employment and has been administered in a fair and extremely flexible manner. The Agency's use of the plan can by no stretch of the imagination be considered "untrammeled" or "casual social engineering heedless of individual rights." Brief for the United States as Amicus Curiae Supporting Petitioner at 9, 15.

Typical of most affirmative action plans, the Agency's plan set long range goals based on the availability of minorities and women in the area labor force as a means of monitoring the performance in each part of its employment and identifying proper areas in which specific affirmative steps would have to be taken.

The 1978 Plan made clear that the " 'goals' established for each Division should not be construed as 'quotas' that must be met." *Id.* at 64. The plan further specified that: "The 'goals'

should rather be seen as realistic desired levels of achievement correcting imbalances in a Division's work force. Goals should take into account such factors as turnover, layoffs, lateral transfers, new job openings, retirements, and availability of minority, women, and handicapped persons in the area work force who possess the desired qualifications or potential for placement." *Id.*

It is therefore incorrect to claim that the terms and structure of the plan improperly "manipulate the numerical balance of the work force." Brief for the United States as Amicus Curiae Supporting Petitioner at 26. The Agency's monitoring of statistical representation of women in the workplace is precisely how an employer should identify and resolve discriminatory imbalances. In order to ascertain whether discrimination is occurring, an employer necessarily monitors the employment of women and other groups in its workplace. The Justice Department criticizes these long range "monitoring" goals as over-inclusive, but fails to explain how the employer could possibly identify situations of discrimination against a particular group unless it first measured its employment of members of that group against the long range "monitoring" goals based on labor force availability.

The Agency's short term employment goals are by their nature temporary. As the Agency's Director testified, the plan is annually reviewed and modified. Transcript at 50. The annual reviews result in new short term and long term goals. *Id.* As the court of appeals noted, "the Plan is not intended to maintain male-female balance, but simply to eliminate a manifest male-female imbalance. Implicit in the Plan is the intent to stop taking sex into account once the long-range percentage goals are attained. Nothing in the Plan indicates a contrary intent." Pet. App. 25a.

Even the Agency personnel officials understood that the plan was a temporary remedial mechanism. For example, one personnel official, asked at trial whether the plan "was going to go on in perpetuity," responded: "My understanding was that it would go on until the goals were achieved. . . .[I]n an area in which the goal had been met or exceeded, the plan had no role to play, in the hiring decision or recruitment or any other aspect of employment." Transcript at 242-43.

In its 1978 Plan, the Agency explicitly recognized that attaining the desired goals will take a long time. J.A. 58, 60. Before formulating the 1978 Plan, the Agency had in 1972 devised a five-year plan without short term goals. J.A. 37-38. Given the continued underrepresentation of women and minorities five years after the original plan was initiated, *id.*, it was obvious that the Agency would not eliminate discriminatory patterns of employment within a particular, specified period of time. The absence of an "ending date" in the 1978 Plan reflects only the Agency's realistic assessment — underscored throughout the plan — that the plan's goals would not be met for quite a long time, particularly in the traditionally male job categories. Indeed, studies have shown that breaking down discriminatory barriers to the employment of women in nontraditional jobs has been slow, despite affirmative action efforts. Hammerman, *supra*, at 59 table IV-3, 63 table IV-8; Jonathan S. Leonard, *The Impact of Affirmative Action* 110, 134-35, 150 table 4.3, 385, 388 (1983). One explanation is that affirmative action has a shorter history for women than for other groups. *Id.* at 102, 121. Attainment of gender goals may take a long time. This, however, does not make the attainment effort perpetual. The Agency's 1978 Plan was therefore a temporary measure that satisfies all requirements set forth by this Court in *Weber*, 443 U.S. at 208.

In order to assure that race-conscious remedies do not unduly injure nonminorities, this Court has required that the remedy neither serve as an "absolute bar" to the advancement of nonminorities nor "unnecessarily trammel" the interests of the latter. *Weber*, 443 U.S. at 208. *See also Sheet Metal Workers*, 106 S. Ct. at 3052-53. The court of appeals correctly concluded that the Agency's plan does not absolutely bar the advancement of male employees. "When there is but one opening, the selection of one candidate will necessarily result in exclusion of all others." Pet. App. 28a. That court further explained that absent a distinct pattern of exclusion of nonminority candidates from particular positions, it could not "conclude that a single employment decision serves as a bar or unnecessarily trammels the interests of other employees." Pet. App. 29a.

The Agency's affirmative action plan is fair and flexible. Furthermore, the Agency fairly applied it in this case. Having expressed an interest in the dispatcher position in 1972, Joyce obtained nearly five years of road maintenance experience in order to qualify for the job. After passing a series of examinations, Joyce ranked among seven men as a qualified candidate for promotion to the position of road dispatcher. In her nearly five years as a road maintenance worker, Joyce performed a wide variety of road maintenance jobs for the County. In addition, Joyce had eighteen years of previous clerical experience, including three-and-one-half years as a road yard clerk. While she was a road yard clerk, Joyce filled in as a road dispatcher on a part-time basis. Petitioner's experience was similar in that he had a few years of road maintenance work experience, eleven years as a road yard clerk and several months of unofficial experience as an "out-of-class" road dispatcher for the County. Under Agency practice, Joyce and Petitioner were equally qualified.

The Agency's appointing authority, its Director, testified that based on the prior experience of the two candidates and their close rankings after two oral boards, he perceived no material difference in their relative qualifications. The Director testified that he "knew that the scores were relatively close . . . , and that certainly, to my mind, if they were within a couple of points, I don't consider that a significant variation. . . . in my own mind, based on what I had been told about their qualifications and reviewed on my own, I felt that both of them were capable of handling the job, and that both of them had the qualifications necessary to perform tasks required as part of the job." Transcript at 24.

As the Director testified, he had discretion to take numerous factors into account in making the promotion, and "the raw ranking, or the raw test score, is only one of the factors to be considered." *Id.* at 54-55. Furthermore, in commenting on the practical effect of this single promotion, the Director testified that "it provided [that] one of . . . 270 positions was now occupied by a female incumbent . . . . [P]hilosophically it made a larger impact in that it probably has encouraged other females and minorities to look at the possibility of so-called

'non-traditional' jobs as areas where they and the Agency both have samples of a success story." *Id.* at 64. In light of the Agency's need for her qualifications and experience, it cannot be said that the Agency promoted Joyce solely because of her gender. Rather, gender was merely one factor that management considered in choosing between several qualified candidates.

Although the 1978 Plan encouraged the promotion of minorities and women, it did not create an absolute preference for women and minorities or encourage layoffs of men and nonminorities. In partial reliance on the plan, the Agency promoted the first woman skilled craft worker in its history, without foreclosing the advancement opportunities of men. The plan is a flexible attempt to remedy a gross statistical imbalance in the work force. The plan paved the way for management to exercise its discretion "to eliminate conspicuous [gender] imbalance in traditionally segregated job categories." *Weber*, 443 U.S. at 209. The Court has approved the exercise of that discretion despite the fact that the benefit accorded one employee may indirectly injure another.

The Agency has instituted precisely the type of reasonable remedial measures that the Court and Congress have long endorsed. *Sheet Metal Workers*, 106 S. Ct. at 3053; *Wygant*, 106 S. Ct. at 1848 (plurality opinion); *id.* at 1861 (Marshall, J., dissenting); *Weber*, 443 U.S. at 209. In adopting the 1978 Plan, the Agency attempted to begin to correct what it perceived to be a "great under-representation" of women. *See* 1978 Plan, J.A. 45. In particular, the Agency lamented the extraordinary underrepresentation of women in technical and skilled craft job classifications. *Id.* at 58 ("It is particularly evident that it will be extremely difficult to significantly increase the representation of women in technical and skilled craft job classifications where they have traditionally been greatly underrepresented."). Ignoring the plan's express remedial purpose and the gross statistical disparities between the total absence of women in skilled craft jobs and the number of women in the relevant labor pool, Petitioner and the United States urge this Court to adopt an unnecessarily stringent threshold of proof that the plan is remedial.

The application of an affirmative action plan inevitably disappoints some expectations. Nevertheless, Title VII undoubtedly allows an employer to consider gender in choosing between several qualified candidates in order to break down sex segregation and provide equal opportunity for women in the workplace. To invalidate an affirmative action plan anytime someone is injured would defeat the very remedial purposes of Title VII by tying the hands of employers "who wish to express and act upon their commitment to social justice." Pet. App. 24a.

The Agency has demonstrated that it embarked on its affirmative action program in light of overwhelming and convincing evidence that remedial action was warranted to remedy a conspicuous imbalance in its work force. The Agency's own conclusion that its continuing history of excluding women from upper-level and traditionally male jobs justified remedial measures should be respected. Petitioner's argument that affirmative action plans should be treated as presumptively invalid wholly ignores this Court's pronouncements in *Weber* and its progeny that reasonable remedial measures not only comply with Title VII, but also "mirror" the very purposes of Title VII. *Weber*, 443 U.S. at 208. In addition, as discussed below, Petitioner's premise incorrectly places the burden of persuading the Court that a plan is valid on the employer.

3. The Agency Must Not Be Required To Admit or Prove That It Has Discriminated in Order To Institute or Apply an Affirmative Action Plan.

To require employers to wait until they are forced to defend and lose a discrimination lawsuit before they are legally permitted to correct conspicuous discriminatory patterns of employment would be absurd. Nor should employers be required, in effect, to bring such a lawsuit against themselves as part of the justification for an affirmative action plan. In *Wygant*, five Justices explicitly refused to require a finding of past discrimination as a prerequisite to affirmative action. Justice O'Connor rejected the assumption that any affirmative action plan not prefaced by

the employer's own admission of illegal discrimination necessarily addresses only "societal discrimination." 106 S. Ct. at 1854. Moreover, as Justice O'Connor explained, the plurality did not impose a prior finding requirement:

> I believe that this assumption is false and therefore agree with the Court that a contemporaneous or antecedent finding of past discrimination by a court or other competent body is not a constitutional prerequisite to a public employer's voluntary agreement to an affirmative action plan.
>
> . . .
>
> The imposition of a requirement that public employers make findings that they have engaged in illegal discrimination before they engage in affirmative action programs would severely undermine public employers' incentive to meet voluntarily their civil rights obligations.

Id. at 1854-55 (O'Connor, J., concurring in part and concurring in the judgment). *See also id.* at 1848-49 (plurality opinion) (employer itself must conclude that sufficient evidence of discrimination justifies affirmative action). Justices Stevens, Marshall, Brennan and Blackmun similarly concluded that a finding that an employer is guilty of past discrimination is not a prerequisite to remedial measures. *Id.* at 1867 (Stevens, J., dissenting); *id.* at 1862-63 (Marshall, J., dissenting). Thus, it appears that at least eight Justices agree that an employer need not prove its own past discriminatory conduct in order to use affirmative action.

Petitioner is incorrect in claiming that the Agency must make a wholesale effort to prove a case of discrimination against itself in order to justify its plan. A requirement that employers admit illegal discrimination before using preferences would create a fatal disincentive to voluntary Title VII compliance. In order to correct the effects of past discrimination, an employer would have to make admissions which would invite expensive litigation by excluded minority members. No Title VII standard should impose such a practical burden on employers wishing to take affirmative measures. The County counsel told the district

judge during opening argument in this case that "we certainly don't want to attempt to prove that the County has discriminated in the past, but I think Your Honor will recognize that we are in a very vulnerable position in terms of Title VII, as a matter of defending history, given the very few women who have ever held the position of responsibility in road maintenance." Transcript at 12. *See also id.* at 292 (County counsel hesitant to admit past discrimination).

Requiring employers to identify instances and victims of past discrimination, thereby exposing themselves to Title VII claims for backpay and other relief, would contravene the very purpose of Title VII. *Wygant*, 106 S. Ct. at 1855 (O'Connor, J., concurring in part and concurring in the judgment); *id.* at 1862-63 (Marshall, J., dissenting); *Weber*, 443 U.S. at 211 (Blackmun, J., concurring) (an employer required to identify victims of past discrimination would inevitably face claims for backpay). Even the United States recognizes in its amicus curiae brief that any rules designating the quantum of proof required to demonstrate an adequate remedial purpose must "be sensitive to an employer's understandable reluctance to concede guilt, opening him to liability for past discrimination against women or minorities. . . ." Brief for the United States as Amicus Curiae Supporting Petitioner at 17. Moreover, a contemporaneous finding requirement would promote form over substance by approving plans merely because they contain inculpatory statements admitting past discrimination and rejecting plans lacking such statements.

Nevertheless, the United States reiterates an argument that this Court already rejected when it states that a voluntary affirmative action program is valid only when "a Court could order the program as a remedy." Brief for the United States as Amicus Curiae Supporting Petitioner at 18-19 (quoting United States Brief, *United Steelworkers of America v. Weber*, at 21-22). The *Weber* Court, however, highlighted the distinction between the question of "what Title VII requires or. . . what a court might order to remedy a past proved violation of the Act [and] whether Title VII *forbids* private employers and unions from voluntarily

agreeing upon bona fide affirmative action plans that accord racial preferences . . . ." 443 U.S. at 200 (emphasis by Court). We are not in this case confronted with an arguably intrusive exercise of district court power over the promotion decisions of an employer. *Cf. City of Cleveland*, 106 S. Ct. at 3076-77.

An affirmative action plan voluntarily adopted by an employer need not be justified by the same quantum of proof that a plaintiff would have to produce in order to sustain a case of discrimination. Affirmative Action Guidelines, 29 C.F.R. § 1608.1(c) (1985). In this case, the Agency has clearly articulated a legitimate reason for preferring Joyce over Petitioner on the basis of gender. It is not required to show more.

4. The Burden of Proof as to the Validity of an Affirmative Action Plan Rests with the Party Attacking the Plan.

Petitioner failed to meet his burden of proving the 1978 Plan invalid. Moreover, the district court improperly placed the burden of proving the plan valid on the Agency. That court stated that "[t]he burden is upon defendant to prove historical justification." Pet. App. 9a. Petitioner unpersuasively argues that the longstanding principle that the plaintiff in a Title VII disparate treatment case carries the burden of proving his case does not apply to this lawsuit. Petitioner's Brief at 45-46.

As this Court made clear in *Wygant*, the ultimate burden remains with the employee to demonstrate the invalidity of an affirmative action program. 106 S. Ct. at 1848 (plurality opinion), 1856 (O'Connor, J., concurring in part and concurring in the judgment). Justice O'Connor explained in *Wygant:*

> In "reverse discrimination" suits, as in any other suit, it is the plaintiffs who must bear the burden of demonstrating that their rights have been violated. . . . [W]hen the Board introduces its statistical proof as evidence of its remedial purpose, thereby supplying the court with the means for determining that the Board had a firm basis for concluding that remedial action was appropriate, it is incumbent upon the nonminority teachers to prove their case; they continue to bear the ultimate burden of persuading the

> court that the Board's evidence did not support an inference of prior discrimination and thus a remedial purpose, or that the plan instituted on the basis of this evidence was not sufficiently "narrowly tailored." Only by meeting this burden could the plaintiffs establish a violation of their constitutional rights, and thereby defeat the presumption that the Board's assertedly remedial action based on the statistical evidence was justified.

Id.

The Agency demonstrated that it had a firm basis for concluding that its affirmative action plan was necessary to remedy a conspicuous discriminatory pattern of employment. Under *Weber* and its progeny, including the recent decisions handed down by this Court last Term, an affirmative action plan that satisfies the Court's substantive standards is a legitimate and lawful justification for preferring a qualified woman over a qualified man. *Sheet Metal Workers*, 106 S. Ct. at 3050 (affirmative action may be necessary to enforce Title VII effectively); *Weber*, 443 U.S. at 197 (Title VII permits voluntary race-conscious affirmative action plans).

Petitioner has failed to carry its burden of proving that the 1978 Plan is invalid. Rather, the plan represents a bona fide attempt to remedy the vestiges of past discrimination. Petitioner has failed to prove that the Agency instituted the plan for no valid remedial purpose.

B. The Agency Was Justified in Promoting a Woman Certified as "Qualified" to a Traditionally Male 238-Employee Job Category Which Had Never Included a Woman.

Here, years of discrimination, whether purposeful exclusion of women from traditional male occupations or "benign" refusal to open jobs to them, have resulted in an all-male force in one of the Agency's skilled employment categories. There is no way to know who would have taken those positions had the Agency maintained an open door policy to women over its history. It is clear that Diane Joyce, a qualified woman, wanted the job now, and was correctly given it.

If affirmative action is to have any effect, its benefits cannot be limited to actual victims of discrimination. *See Sheet Metal Workers*, 106 S. Ct. at 3054. Accordingly, employers may legally consider gender in making promotions. *Cf. Sheet Metal Workers*, 106 S. Ct. at 3074 (district court may order preferential relief benefitting individuals who are not actual victims of discrimination); *City of Cleveland*, 106 S. Ct. at 3073 n.8 (public employer may sometimes voluntarily agree to take race-conscious measures for legitimate remedial purposes consistent with the Fourteenth Amendment and Title VII). This Court has repeatedly held that, in the proper circumstances, employers may take race or sex into account in making employment decisions. *Wygant*, 106 S. Ct. at 1848 (plurality opinion); *id.* at 1853 (O'Connor, J., concurring in part and concurring in the judgment); *id.* at 1861 (Marshall, J., dissenting); *id.* at 1869 (Stevens, J., dissenting); *Fullilove v. Klutznick*, 448 U.S. 448, 491 (1980) (Burger, C. J.); *id.* at 519 (Marshall, J., concurring in the judgment); *Weber*, 443 U.S. at 204; *University of California Regents v. Bakke*, 438 U.S. 265, 359 (1978) (Brennan, J., concurring in the judgment in part and dissenting in part).

In promoting Joyce, the Agency legally considered her gender as an additional positive factor possessed by an experienced employee rated qualified for the position. That Joyce, even though she was not a proven victim of discrimination, benefitted from the Agency's affirmative action plan is thoroughly consistent with *Weber* and *Sheet Metal Workers*. This is also the only way that the years of all-male hiring which led to the Agency's only single-sex job classification could be brought to an end. That is the purpose of lawful affirmative action.

CONCLUSION

Affirmative action of the type engaged in by the Agency here is the only way to redress generations of discrimination whose victims are not available to seek redress on their own behalf. Without it, patterns of discrimination cannot be undone in the forseeable future. In attacking the Agency's plan and its application, Petitioner failed to satisfy his burden of proving that

the Agency violated Title VII. The Agency acted legally in instituting and applying its flexible affirmative action plan to remedy a conspicuous discriminatory pattern of employment. A voluntary affirmative action policy is presumptively valid under Title VII when the employer has a firm basis for concluding that remedial action is appropriate. Statistical disparity is probative of sex discrimination. Therefore, the Agency has produced sufficient evidence to justify its remedial purpose in creating a plan. The employer is not required to prove that it engaged in purposeful discrimination in order to justify an affirmative action plan. Nor does the employer carry the burden of proving that the plan is valid. Petitioner has failed to sustain his burden of proving that the plan lacks a convincing remedial purpose or that the plan unnecessarily trammeled the interests of male employees. Precluding an employer from promoting the first woman in a traditionally male position composed of hundreds of men, when that woman is clearly qualified, would stop affirmative action in its tracks.

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